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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,
Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALTER A. WADE,
BENJAMIN WHAM,
GEORGE W. OTT,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 386

IN THE MATTER OF THE ALBERT DICKINSON COMPANY, A CORPORATION,

Debtor.

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Dickinson Industrial Site, Inc., a corporation, submits this petition for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered May 22, 1939,

modifying and affirming, as modified, an order of the United States District Court for the Northern District of Illinois, Eastern Division, and files herewith a certified copy of a transcript of such portions of the record in said cause as were designated by the præcipe filed therein, and its brief in support of this petition.

Summary of the Matter Involved.

This petition presents a single question:

Does the Bankruptcy Act invest the Circuit Courts of Appeals with jurisdiction to allow an appeal from an order of the bankruptcy court allowing or refusing to allow compensation in proceedings for the reorganization of corporations, when the amount involved in the order is more than $500?

Statement of the Matter Involved.

On June 13, 1934, a creditors' petition for the reorganization of petitioner under Section 77B of the Bankruptcy Act was filed in the District Court (R. 1, *et seq.*) This petition, as subsequently amended, and petitioner's answer thereto, were approved by the District Court on September 10, 1934 (R. 10). On February 23, 1938, the District Court confirmed a plan of reorganization (R. 16).

Thereafter, respondents and others filed petitions for the allowance of compensation and reimbursements for expenses. In their petition respondents requested an allowance of $20,000 for compensation to them for their services in the reorganization (R. 40-41, 49). These petitions were referred to a Special Master who took testimony and reported (R. 26). On October 26, 1938, the District Court ordered allowances of compensation and reimbursement to the various applicants (R. 26). Respondents were allowed but $2,000 of the $20,000 requested by them (R. 26).

On November 25, 1938, respondents filed their petition in the Court of Appeals asking that leave be granted them to appeal from the order of October 26, 1938, fixing their compensation at $2,000 (R. 34, *et seq.*).

On December 5, 1938, petitioner filed in the Court of Appeals its petition asking that leave be granted to it to appeal from the same order with respect to allowances of compensation to certain other applicants (R. 48-49). This petition was docketed in the Court of Appeals as Cause No. 6822, to which the Court of Appeals refers in its present opinion (R. 49, 51).

On the same day, December 5, 1938, petitioner also filed in the District Court a notice of appeal from the order of October 26, 1938 (R. 28). This appeal was docketed in the Court of Appeals as Cause No. 6842, to which the Court of Appeals also refers in its present opinion (R. 48).

On December 13, 1938, the Court of Appeals granted leave to respondents to appeal from the order of October 26, 1938 (R. 42). Petitioner's petition for leave to appeal from this order was denied (R. 49), the court being of the opinion that it had no jurisdiction to allow the appeal.

On December 28, 1938, the District Court granted petitioner's motion for an order directing the clerk of that court to authenticate and transmit to the clerk of the Court of Appeals the original papers filed in the proceedings, pursuant to petitioner's notice of appeal, filed December 5, 1938, and Section 250 of the Bankruptcy Act (R. 33). The original papers in the proceedings were duly authenticated and transmitted to the clerk of the Court of Appeals and filed as the record in Cause No. 6842 (R. 38, 67).

On January 10, 1939, petitioner filed its motion in the Court of Appeals to dismiss the appeal from the order of October 26, 1938, which that court had allowed to respondents on December 13, 1938, on the ground that the Court of

Appeals had no jurisdiction to allow the appeal (R. 43). After briefs had been filed, the Court of Appeals continued the motion to the hearing on the merits (R. 44).

Controversies over the allowances made by the District Court then existing between petitioner and the appellees in Cause No. 6842, excepting the controversy with the appellee, Glenn, Real & Browning, were settled during the pendency of the appeal and prior to the hearing before the Court of Appeals (R. 48).

The instant case was heard by the Court of Appeals with Cause No. 6842 on the original papers which had been transmitted by the clerk of the District Court and filed in the latter cause (R. 67). At the hearing the Court of Appeals affirmed the order of the District Court as to the allowance made to Glenn, Real & Browning and took under advisement petitioner's motion to dismiss respondents' appeal (R. 47).

The Court of Appeals thereafter denied petitioner's motion to dismiss respondents' appeal (R. 47) and, at the same time, modified the order of the District Court by increasing respondents' allowance from $2,000 to $10,000, and affirmed the order as so modified (R. 57).

Reasons Relied Upon for the Allowance of the Writ.

The reasons relied upon for the allowance of the writ herein are:

(1.) The present decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *London, et al.* v. *O'Dougherty*, 102 F. (2d) 524, denying the allowance of an appeal from an order awarding compensation in a proceedings for the reorganization of a corporation when the amount involved in the order was more than $500. In its suplemental opinion, the Circuit Court of Appeals for the Seventh Circuit recognized the existence of this conflict in the following words (R. 58):

"The deference we owe to, and the respect we have for the views of, the Second Circuit Court of Appeals, which reached a different conclusion in *London* v. *O'Dougherty*, 102 F. (2d) 524, have added to our anxieties."

The present decision is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *In re Winton Shirt Corporation*, 104 F. (2d) 777, where it was held that "by the amendment [Section 24a of the 1938 amendments] the troublesome distinction between 'controversies' and 'proceedings' existing under the prior statute has been eliminated," and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *England* v. *Ducasse*, 104 F. (2d) 760, holding that "since it [the order] involves over $500, the proposed appeal is not allowable by this Court."

(2.) The question, whether appeals from orders of the bankruptcy courts, allowing or refusing to allow compensation or reimbursement in proceedings for the reorganization of corporations, when the amount involved in any such order is over $500, may be taken as a matter of right or must be allowed by the Circuit Court of Appeals, is an important question of federal law which has not been, but should be, settled by this Court. Otherwise, elimination of the uncertainty as to the proper manner of appeal, which it was one of the purposes of the 1938 amendments of the Bankruptcy Act to accomplish, will not be achieved, and the wasteful practice of pursuing simultaneously two methods of appeal, which prevailed under the Bankruptcy Act prior to these amendments, will be continued. In view of the existing conflict in the decisions of the Circuit Courts of Appeals, it is only by a decision of this Court that the manner of appealing from these orders may be determined and the practice settled.

WHEREFORE, petitioner prays that this petition for a writ of certiorari may be granted and that this Court proceed as is provided by law and the rules of this Court in such cases, and that upon final hearing, the decree of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

WALTER A. WADE,
BENJAMIN WHAM,
GEORGE W. OTT,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion Below.

The opinion and supplemental opinion of the Circuit Court of Appeals for the Seventh Circuit is printed in full in the record (R. 48, 58) and is reported in 104 F. (2d) 771.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347 (a)).

The decree sought to be reviewed was entered by the Circuit Court of Appeals on May 22, 1939 (R. 57), and petition for rehearing was denied by that Court on June 24, 1939 (R. 60).

III.

Statement of the Case.

The facts pertinent to the question here presented are sufficiently recited in the Petition under the caption "Statement of the Matter Involved."

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In allowing an appeal to respondents from the order of the District Court, when the amount involved in the order was more than $500.

(2) In denying petitioner's motion to dismiss the appeal.

(3) In holding that it had jurisdiction to allow the appeal.

(4) In reviewing the order of the District Court upon the appeal which it had allowed.

(5) In modifying and in affirming, as modified, the order of the District Court.

V.

Summary of Argument.

The Chandler Act amendments, which became effective September 22, 1938, govern the appeal from the order entered by the District Court on October 26, 1938. Section 250 of the Act does not invest the Courts of Appeals with jurisdiction to allow appeals from orders relating to allowances of compensation or reimbursement for expenses. By the terms of that Section, appeals from these orders must be taken or allowed in the manner provided for by Section 24 of the Act, which limits the jurisdiction of the Courts of Appeals over allowances of appeals to orders involving less than $500.

Section 24a eliminates the distinction, in respect of appeals, between "proceedings" and "controversies" which existed under former Section 24; and it is not the intent of Section 250 to retain this distinction. The construction of Section 250 by the Court of Appeals in the present decision ignores the words "in the manner • • • provided for appeals by this Act" and the words "Appeals may be taken • • • from orders making or refusing to make allowances", in that Section, and completely ignores Section 5b of the amendatory Act. Nor does this construction further a more expeditious disposition of the proceedings, which is the principal reason advanced by the Court of Appeals in support of this construction. The extension of time for appeal to forty days under Section 25a of the Act is

incompatible with an intent to expedite the proceedings by circumscribing appeals from orders of the bankruptcy courts.

VI.

ARGUMENT.

The Bankruptcy Act does not invest the Circuit Courts of Appeals with jurisdiction to allow an appeal from an order of the Bankruptcy Court allowing or refusing to allow compensation in proceedings for the reorganization of corporations, when the amount involved in the order is more than $500.

The Court of Appeals holds that Section 250 of the Bankruptcy Act vests exclusive jurisdiction in the Courts of Appeals over the allowance of appeals from orders relating to compensation and reimbursement in proceedings for reorganization of corporations, and that this jurisdiction is wholly independent of the jurisdiction over the allowance of appeals vested in the Courts of Appeals by Section 24a of the Bankruptcy Act.

Section 24a (52 Stat. at L. 854; 11 U. S. C. A. Sec. 47a) is as follows:

> "The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact; Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law

only: Provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court."

Section 24b (52 Stat. at L. 854; 11 U. S. C. A. Sec. 47b) is as follows:

"Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Section 250 (52 Stat. at L. 901; 11 U. S. C. A. Sec. 650) is as follows:

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

These sections are new and were incorporated in the Bankruptcy Act by the amendatory Act of June 22, 1938 (Chapter 575, 52 Stat. at L. 840-940), commonly called the "Chandler Act", which became effective September 22, 1938 (52 Stat. at L. 940).

The Bankruptcy Act, prior to the Chandler Act amendments, made provision for appeals from orders of the bankruptcy court, which, so far as pertinent here, is as follows:

Section 24(a) (11 U. S. C. Sec. 47(a)):

"The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeal of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, are invested with appel-

late jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

Section 24(b) (11 U. S. C. Sec. 47(b)):

"The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 48 of this title) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 48 of this title to be allowed in the discretion of the appellate court."

Section 77B (c) (9) (11 U. S. C. A. Sec. 207 (c) (9)):

"(c) Upon approving the petition or answer or at any time thereafter, the judge * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan * * * but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily."

Section 4 of the amendatory Act repeals all parts of the Bankruptcy Act of 1898 inconsistent with the amendatory Act "Except to the extent necessary to give effect to the provisions of Section 6 of the amendatory Act" (52 Stat. at L. 940): and Section 6b of the amendatory Act provides that "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect." (52 Stat. at L. 940.)

Obviously, Section 24 of the Chandler Act is inconsistent with former Section 24. It is also clear that the application of Section 24 of the Chandler Act to appeals from orders entered in pending proceedings after the effective date of the amendatory Act is "practicable" within the meaning of Section 6b. It follows, therefore, that former Section 24 was *repealed* on the effective date of the amendatory Act by Section 4, at least in respect of appeals from orders thereafter entered.

Section 276c of the Chandler Act (52 Stat. at L. 905; 11 U. S. C. A. Sec. 676c) has no application to appeals. This section continues Section 77B in force as to proceedings pending upon the effective date of the amendatory Act, except:

> "(2) If the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable."

While Section 276c (2) declares that in pending cases the provisions of Chapter X (Corporate Reorganization Section) of the Chandler Act shall apply to the extent that the judge shall deem their application practicable, it seems obvious that this has reference only to the regulation of proceedings before the District Court after June 22, 1938, the date of the approval of the Act, and not to appeals. Appeals under the Bankruptcy Act, prior to the Chandler Act amendments, were not discretionary with the District Court. They were either taken in the District Court as a matter of right or were allowed by the Court of Appeals in its discretion. This is also true under the Chandler Act amendments. Hence, in respect of appeals it is immaterial whether or to what extent the District Court might deem the Chandler Act applicable to pending proceedings.

Moreover, appeals from orders allowing or refusing to allow compensation in proceedings under Section 77B were authorized, not by sub-section (c) (9) of Section 77B, but by Section 24b (11 U. S. C. 47(b)), to be allowed in the discretion of the Court of Appeals (*Shulman* v. *Hotel Co.*, 301 U. S. 172). Unlike Section 77B for which Chapter X of the Chandler Act is substituted, Section 24(b) was repealed with no other saving clause than that contained in Section 6 of the amendatory Act.

Clearly, appeals from orders entered in bankruptcy proceedings after September 22, 1938, the effective date of the amendatory Act, are governed by the Chandler Act. On this point, the Court of Appeals holds that the appeal from the order of October 26, 1938, is governed by the Chandler Act. In this respect the present decision is correct and is in accord with the decision of the Court of Appeals for the Second Circuit in *London* v. *O'Dougherty*, 102 F. (2d) 524.

It is, however, with respect to the construction of the provisions of the Chandler Act relating to appeals that the present decision is erroneous and is in direct conflict with the decision in the *London* case.

The *London* case holds that Section 250 of the Chandler Act incorporates Section 24 by reference and thereby limits the jurisdiction of the Courts of Appeals in the allowance of appeals from orders relating to compensation to orders involving less than $500. The court said in a *per curiam* opinion (102 F. (2d) 524) at page 525:

> "The question raised by this motion is whether one must secure the leave of this court to appeal from an order awarding him too small an attorney's allowance in a reorganization under the Bankruptcy Act. Section 24a, 11 U. S. C. A. Sec. 47 (a), requires leave only in case the order 'involves less than $500', and if it governs this appeal, no leave was therefore necessary, for the appellant asked more than $500. However, ap-

peals from allowances are directly governed by Sec. 250, 11 U. S. C. A. Sec. 650, which provides that 'appeals may be taken in matters of law or fact' from such orders, 'and may, in the manner and within the time provided for appeals by this Act (title), be taken to and allowed by the circuit court of appeals'. This language necessarily incorporates the provisions of Sec. 24a as to the 'manner' of taking an appeal, which need not be 'allowed' by us, but lies as of right."

The present decision of the Court of Appeals is also in conflict with its own prior decisions. In denying petitioner's petition for leave to appeal from the order of October 26, 1938, which had been filed within forty days, but more than thirty days, from the entry of the order, and was docketed as Cause No. 6822 (R. 49), the Court of Appeals stated in a memorandum opinion filed December 19, 1938:

"First, it is claimed that an appeal addressed to the discretion of this court should be filed within thirty days, and that otherwise the court is without jurisdiction. *Shreiner* v. *Farmers Trust Co.*, 91 F. (2d) 606, and cases therein cited, is cited as authority for such proposition. Undoubtedly the rule is as therein announced, unless the matter of the appeal is controlled by the Bankruptcy Act of 1938 (now Chandler Act.) Under Section 25(a) of the Bankruptcy Act as amended by this Act (Title 11 U. S. C. A. 48), the appeal may be taken within forty days. Under Section 24(a) of the amended Act Title 11 U. S. C. A. 47), however, it seems definite that the allowance of an appeal by this court is permissible only when there is less than $500 involved. Here the amounts involved are each more than that amount. So it is apparent that under either theory, the appeal should not be allowed."

In Cause No. 6842, the Court of Appeals *affirmed* the order of October 26, 1938, as to the only appellee left in the case, upon an appeal which petitioner had taken as a matter

of right by filing a notice of appeal in the District Court (R. 28, 48, 67).

In its present decision, the Court of Appeals holds that Section 250 of the Chandler Act vests in the Courts of Appeals exclusive jurisdiction over the allowance of appeals from orders relating to compensation without regard to the amount involved, and that it was not the intention of Congress to limit this jurisdiction by reference to Section 24.

Section 250 provides that appeals from orders making or refusing to make allowances of compensation or reimbursement may "in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers." This Section regulates in some particulars the procedure on appeal, but the language used clearly negatives any intent to provide in this Section for "the manner" of appeal from these orders. On the contrary, this Section declares that the manner of appeal has been provided for elsewhere in the Act, and that appeals from orders allowing or refusing to allow compensation or reimbursement shall be taken and allowed in the same manner.

Section 24 of the Chandler Act authorizes appeals from orders both in proceedings in bankruptcy and in controversies arising in proceedings in bankruptcy to be taken to the Court of Appeals, except in cases where the amount involved in any such order is less than $500, when the appeal must be allowed by the Court of Appeals. The reference in Section 250 is undoubtedly to this Section as to the manner of appeal, and to Section 25a as to the time for appeal. The words "Appeals may be taken * * * from orders making or refusing to make allowances * * * and may * * * be taken to and allowed by the Circuit Court of appeals" in Section 250 embraces both manners of appeal provided for by Section 24.

Section 250 is substantially a re-enactment of Subdivision (c) (9) of Section 77B. Although Subdivision (c) (9) made no reference to other sections of the Bankruptcy Act, it was uniformly held that allowances of compensation were "proceedings" which could be reviewed only under Section 24 (b), upon the allowance of an appeal by the Courts of Appeals (*Shulman* v. *Hotel Co.*, 301 U. S. 172; *Dee* v. *United Exchange Building*, 88 F. (2d) 372; Vol. 3 Gerdes Corporate Reorganizations, Sec. 1207, p. 1935; and cases cited). The reference contained in Section 250 to other sections of the Act as to the provisions made for the manner and time of appeal from orders required to be allowed by the Courts of Appeals is an express adoption of this construction.

It would seem unlikely that any doubt could arise as to the incorporation by Section 250 of Section 24 and Section 25; but if doubt as to this can be deemed to exist, this doubt is dispelled by Section 5b of the amendatory Act (52 Stat. at L. p. 940), which provides that:

> "Section and subdivision headings shall not be taken to govern or limit the scope of the sections or subdivisions to which they relate."

Section 24a of the Chandler Act eliminates entirely the distinction, as respects the manner of appeal, between orders in "controversies arising in bankruptcy proceedings" and orders in "proceedings of the several inferior courts of bankruptcy" which existed under sub-sections (a) and (b) of former Section 24. The *proviso* that an appeal from an order which involves less than $500 may be taken only upon an allowance by the appellate court applies both to "proceedings" and to "controversies". The only possible end to be gained by amending Section 24 was the elimination of this troublesome distinction, which had given rise to so much litigation (In re Winton Shirt Corporation, 104 F. (2d) 777).

However, the Court of Appeals holds that it is the intent of Section 250 to guard against the obliteration of this distinction in respect of appeals from orders relating to compensation and reimbursement. This construction does violence to the language of that Section. It ignores the words "in the manner * * * provided for appeals by this Act," and the words "Appeals may be taken * * * from orders making or refusing to make allowances." It also ignores Section 5b of the amendatory Act. Nor does this construction further a more expeditious administration, which is the principal reason advanced by the Court of Appeals in support of this construction.

Allowances of compensation usually cannot be made until a plan of reorganization is approved, or some other disposition is made of the proceedings, for, until then, an evaluation of the services which have been or which may thereafter be rendered is impossible. When this point is reached, the District Court can and will fix the amount of compensation and terms of payment with due regard to the value of the services, to the ability of the estate or of the reorganized corporation to pay, and to the plan of reorganization, if one has been approved. It is extremely improbable that appeals from orders relating to compensation could impede the proceedings or would be likely to do so.

Certainly, greater danger to the expeditious disposition of these proceedings lies in appeals from other orders which under Section 24 of the Chandler Act may be taken as a matter of right. And if Congress had believed that appeals would vexatiously and unnecessarily obstruct the speedy conclusion of proceedings in the bankruptcy courts, it would not have extended the time for appeal (and for leave to appeal) to forty days, as it did under Sec. 25a of the Chandler Act (52 Stat. at L. 855, 11 U. S. C. A., Sec. 48a; cf: 11 U. S. C. Sec. 47(c)).

But the danger of delay by appeals from orders relating to compensation and reimbursement, if it exists, is removed by the provision in Section 250, that appeals "shall be summarily heard upon the original papers." Less time is lost, in obtaining a summary hearing upon the original papers than in preparing and filing a petition for the allowance of an appeal and supporting brief, which may not be acted upon for some time, and, if allowed, will result in further delay.

Conclusion.

We respectfully submit that for the reasons stated the petition for certiorari filed herein should be granted.

Respectfully submitted,

WALTER A. WADE,
BENJAMIN WHAM,
GEORGE W. OTT,
Counsel for Petitioner.